No. 13-1318

Title:	Tracey L. Johnson, et al., Petitioners
	v.
	City of Shelby, Mississippi
Docketed:	May 1, 2014
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(12-60735)
Decision Date:	November 19, 2013
Rehearing Denied:	January 29, 2014

~~Date~~	~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 29 2014	Petition for a writ of certiorari filed. (Response due June 2, 2014)
May 21 2014	Order extending time to file response to petition to and including July 2, 2014.
Jul 2 2014	Brief of respondent City of Shelby, Mississippi in opposition filed.
Jul 16 2014	DISTRIBUTED for Conference of September 29, 2014.
Jul 16 2014	Reply memorandum of petitioners Tracey L. Johnson, and David James, Jr. filed. (Distributed)
Oct 6 2014	DISTRIBUTED for Conference of October 10, 2014.
Oct 14 2014	DISTRIBUTED for Conference of October 17, 2014.
Oct 27 2014	DISTRIBUTED for Conference of October 31, 2014.
Nov 3 2014	DISTRIBUTED for Conference of November 7, 2014.
Nov 10 2014	Petition GRANTED. Judgment REVERSED and case REMANDED. Opinion per curiam. (Detached Opinion)
Dec 12 2014	JUDGMENT ISSUED.

RECORD
AND
BRIEFS

13-1318

No. _____

Supreme Court, U.S.
FILED
APR 29 2014
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TRACEY L. JOHNSON and DAVID JAMES, JR.,

Petitioners,

versus

CITY OF SHELBY, MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a federal complaint subject to dismissal when it fails to cite the statute authorizing the cause of action?

2. Do the lower federal courts have authority to create pleading requirements for complaints when those requirements are not contained in the Federal Rules of Civil Procedure?

3. Should a federal complaint be dismissed when it alleges the elements of a 42 U.S.C. § 1983 claim, but does not cite 42 U.S.C. § 1983?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Tracey L. Johnson, Petitioner;
2. David James, Jr., Petitioner; and
3. City of Shelby, Mississippi, Respondent.

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OPINIONS BELOW

The published decision of the United States Court of Appeals for the Fifth Circuit is reported at 743 F.3d 59 (5th Cir. 2013) and is attached as Appendix 1-11. The unpublished Order (Opinion) of the district court granting summary judgment in favor of Respondents is Appendix 12-14. The unpublished Final Judgment of the district court dismissing Petitioners' complaint is Appendix 15-16. The unpublished district court Order Denying Motion to Alter or Amend Judgment of the district court is Appendix 17. The order of the United States Court of Appeals for the Fifth Circuit denying petition for rehearing *en banc* and petition for rehearing is Appendix 18-19. The complaint at issue in this case is attached as Appendix 20-27.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on November 19, 2013, with a petition for rehearing *en banc* and petition for rehearing denied on January 29, 2014, by writ of *certiorari* under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Statute Construed

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule Of Civil Procedure Construed

Federal Rule of Civil Procedure 8 provides:

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

> **(2)** a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> **(3)** a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8(a).

STATEMENT OF THE CASE

Petitioners Tracey L. Johnson and David James, Jr. (hereinafter, collectively, "Petitioners") filed a complaint alleging that the Defendant/Respondent City of Shelby, Mississippi (hereinafter "Respondent") terminated them in violation of their Fourteenth Amendment due process rights.[1] App. 20-27 (Complaint). The district court granted summary judgment for Respondent, App. 14, and denied Petitioner's motion to alter or amend judgment. App. 17. The Court of Appeals for the Fifth Circuit affirmed, App. 12, and denied the Petition for Rehearing. App. 18-19.

Petitioners' summary judgment materials allege that Petitioners, who were police officers employed by Respondent, were terminated because of animosity

[1] Petitioners also filed a claim against the individual defendant Harold Billings for a state law violation for malicious interference with employment. The court of appeals upheld the district court's dismissal of the state law claim for state law procedural reasons not relevant to this Petition. App. 10.

against them by a city alderman, Harold Billings. Billings had developed a plan to bring illegal prostitution and illegal gambling to the city. Petitioners had opposed Billings' plan. Because of Petitioners' opposition to Billings' illegal activities, Respondent fired Petitioners based on a three-two (3/2) vote. The board majority consisted of Billings, a second alderman, who was employed by Billings, and a third alderman, whose business had been threatened with a boycott by Billings if she supported Petitioners.

Petitioners' summary judgment materials contain an employment handbook requiring "cause" for employee termination. Petitioners contend that the handbook gave them a property interest in their continued employment. Petitioners further contend that this property interest was taken without due process because Respondent refused to hear Petitioners' witnesses, and rescinded the handbook on the very date it voted to terminate Petitioners' employment. Petitioners, thus, alleged a claim for the taking of "property" without due process of law, as described in such cases as *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

Respondent's summary judgment evidence was that Petitioners were fired for legitimate reasons – because of protests by citizens whom they had arrested.

The district court granted summary judgment on Petitioners' federal due process claims without addressing the merits of the case. Rather than make

any determination as to whether Petitioners' facts were sufficient to show a federal constitutional violation, the district court granted summary judgment on the sole ground that Petitioners had failed to cite in their complaint the statute (42 U.S.C. § 1983), which authorizes the cause of action. App. 12-13. The district court then denied Petitioners' motion to alter or amend the judgment, which requested they be allowed to amend the complaint so as to cite 42 U.S.C. § 1983. App. 17.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed, stating:

> Johnson and James contend that the district court erred when it determined that the City was entitled to summary judgment on their due process claims because they failed to invoke § 1983 in their complaint. We disagree.
>
> We have consistently upheld such dismissals, explaining that "the proper vehicle for these allegations is § 1983." *Burns-Toole v. Byrne*, 11 F.3d 1270, 1273 n.3 (5th Cir. 1994). A "complaint is fatally defective in that it fails to state a claim upon which relief may be granted" when it does not invoke § 1983 for claims of constitutional violations under color of state law. *Hearth, Inc. v. Dep't of Pub. Welfare*, 617 F.2d 381, 382-83 (5th Cir. 1980). . . .

743 F.3d at 62; App. 4-5.

REASON FOR GRANTING THE WRIT

THE OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONTRAVENES *LEATHERMAN V. TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT*, 507 U.S. 163 (1983), WHICH HELD THAT THE FEDERAL COURTS LACK AUTHORITY TO ADD PLEADING REQUIREMENTS IN ADDITION TO THOSE CONTAINED IN THE FEDERAL RULES OF CIVIL PROCEDURE. THIS COURT SHOULD ACCEPT THIS CASE TO DETERMINE WHETHER *LEATHERMAN* WAS OVERRULED BY *ASHCROFT V. IQBAL*, 556 U.S. 662 (2009) AND *BELL ATLANTIC CORP. V. TWOMBLY*, 550 U.S. 544 (2007).

> "[E]very little while there seems a recurring hope or belief that we can somehow tie the parties up and avoid trials by requiring detailed pleading. . . ."

Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyoming L.J. 177, 181 (1958).[2]

In this case, the United States Court of Appeals for the Fifth Circuit added a procedural barrier to the pleading requirements listed in the Federal Rules of Civil Procedure. This additional pleading hurdle

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[2] Judge Charles Clark, quoted in Jason G. Gottesman, *Speculating as to the Plausible: Pleading Practice After Bell Atlantic Corp. v. Twombly* [550 U.S. 544 (2007)], 17 Widener L.J. 973 (2008).

contravenes *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). *Leatherman* rejected the United States Court of Appeals for the Fifth Circuit's "heightened pleadings" requirements for 42 U.S.C. § 1983 actions against municipalities, and directed that any "added specificity requirement . . . must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. . . ." *Leatherman*, 507 U.S. at 168. *Leatherman* further taught:

> We think that it is impossible to square the "heightened pleading standard" applied by the Fifth Circuit in this case with the liberal system of "notice pleading" set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief."

Leatherman, 507 U.S. at 168.

What a complaint must plead to show that the "pleader is entitled to relief" in a 42 U.S.C. § 1983 cause of action was concisely stated in *Gomez v. Toledo*, 446 U.S. 635 (1980):

> By the plain terms of § 1983, two-and only two-allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second,

> he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Gomez, 446 U.S. at 640.[3]

Gomez's requirement that the complaint allege that some person has deprived a plaintiff of a federal right was met. The complaint described facts showing Petitioners had a "property" interest in their employment. App. 22 (Complaint, ¶ 5). The complaint alleges a denial of due process because it claims Petitioners were informed that "no evidence would be received" at a hearing in opposition to their terminations. App. 24 (Complaint, ¶ 12).

The *Gomez* requirement, that it be alleged that "the person who has deprived him of that right acted under color of state or territorial law," *Gomez*, 446 U.S. at 640, is also met. The complaint alleges that Respondent "at all relevant times acted under color of state law." App. 21 (Complaint, ¶ 2).

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[3] Of course, jurisdiction must be alleged under the Federal Rules of Civil Procedure 8(a)(1). "As the United States Supreme Court and the major commentators have all pointed out, 42 U.S.C. § 1983 is not a jurisdictional statute . . . Jurisdiction of civil rights actions is instead conferred by 28 U.S.C. § 1343,. . . ." *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1346-47 (5th Cir. 1985) (footnotes omitted). Petitioners' complaint did allege jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343, App. 21, thus complying with Federal Rule of Civil Procedure 8(a)(1).

The Fifth Circuit's dismissal for failure to cite 42 U.S.C. § 1983 in the complaint can only be correct if this Court's rule in *Leatherman* – that lower federal courts have no authority to erect procedural barriers not contained in the Federal Rules of Civil Procedure – has been overruled by this Court's subsequent decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). There has been an immense amount of academic debate on exactly how and whether *Iqbal* and *Twombly* changed federal procedural rules.[4]

The Court should grant the Writ to resolve the important question of whether *Iqbal* and *Twombly* should be interpreted as overruling the *Leatherman* holding that the federal courts lack authority to add pleading requirements to those specified in the Federal Rules of Civil Procedure. The straightforward holdings of *Iqbal* and *Twombly* are that in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678. The *Twombly/Iqbal* holdings – that

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[4] See Jeffrey J. Rachlinski, *Why Heightened Pleading – Why Now*, 114 Penn St. L. Rev. 1247 (2010) (stating "Ashcroft v. Iqbal may be the Supreme Court case that launched a thousand law review articles"); Adam N. Steinman, *The Pleading Problem*, 62 Stan. L. Rev. 1293 (2010) (stating "*Federal pleading standards are in crisis. The Supreme Court's recent decisions in* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal *have the potential to upend civil litigation as we know it*" (emphasis in original)).

the allegations in a complaint must be "plausible" – is a far cry from adding a pleading requirement mandating that the statute authorizing a cause of action be specifically cited in a federal complaint. *Leatherman* stated that the Fifth Circuit's "heightened pleading" was an improper modification of the "'notice pleading' set up by the Federal Rules." *Leatherman*, 507 U.S. at 168. This Court approved *Leatherman* in *Erickson v. Pardus*, 551 U.S. 89, 93 (2007), which held a complaint need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."

In this case, Respondent admitted that it had "fair notice" that this claim was brought under 42 U.S.C. § 1983, since it pled in its answer that "the City of Shelby, Mississippi cannot be held liable for damages pursuant to 42 U.S.C. § 1983." Answer, "Seventh Affirmative Defense." Furthermore, it is clear the complaint was brought under 42 U.S.C. § 1983, since *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989), holds that 42 U.S.C. § 1983 is the exclusive remedy for federal claims against state actors under color of state law. Thus, the Fifth Circuit's new pleading requirement is a pure technicality, precluding the court from reaching the merits of the case. Yet, this Court has long rejected the notion that "one misstep by counsel" should be "decisive to the outcome. . . ." *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

A holding that *Iqbal* and *Twombly* have overruled *Leatherman* and permitted the lower federal courts to

impose additional pleading requirements to the Federal Rules of Civil Procedure also calls into question the validity of the forms attached to the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 84 states that the forms contained in the appendix "suffice." The forms cite several examples of pleadings which thus "suffice." None of the form complaints cite the statute under which the action is brought. For example, Federal Rule of Civil Procedure Form 13 is the form for complaints authorized by the Federal Employers' Liability Act, 45 U.S.C. § 51, but the form does not cite the Federal Employers' Liability Act. Federal Rule of Civil Procedure Form 14 is the form for a complaint alleging a violation of the Merchant Marine Act, 46 U.S.C. § 1101, but the form does not cite the Merchant Marine Act. Federal Rule of Civil Procedure Form 19 is the form for a complaint under the Copyright Act, 17 U.S.C. § 501, but the form does not cite the Copyright Act.

In light of the fact that the appendix to the forms attached to the Federal Rules of Civil Procedure demonstrates that the forms do not cite the statutes authorizing the cause of action, a question arises as to whether using the forms "suffice," even though Federal Rule of Civil Procedure 8(a) says they do "suffice." See Geoffrey C. Westbrook, *Evolutionary Pleading: Should Congress Override the Supreme Court's Unnatural Selection in Ashcroft v. Iqbal to Prevent the Extinction of Civil Rights Cases*, 45 New Eng. L. Rev. 205, 243 (2010) (quoting authority which

states that "Iqbal creates doubt as to whether the Forms attached to the Civil Rules are still valid").

Finally, the lower federal courts' erecting procedural obstacles for litigants not contained in the Federal Rules of Civil Procedure raises important issues under the Rules Enabling Act of 1934, 28 U.S.C. §§ 2071-2074. That Act establishes procedures for amending the Federal Rules of Civil Procedure, including requiring that changes in the rules be adopted by the Supreme Court and be subjected to congressional approval. Whether the lower federal courts have authority to make an end-run around the Rules Enabling Act, by adding additional procedural requirements not listed in the Federal Rules of Civil Procedure is an issue of immense importance to every lawyer in America filing a complaint in federal court.

CONCLUSION

The Fifth Circuit Court of Appeals has contravened *Leatherman* since *Leatherman* holds that the lower federal courts lack authority to modify the requirements for pleadings specified in the Federal Rules of Civil Procedure. *Iqbal* and *Twombly*, when compared to *Leatherman*, leave the federal courts in considerable doubt as to exactly what authority they have to modify the requirements of the Federal Rules of Civil Procedure and as to whether the forms attached to the appendix in the Federal Rules of Civil Procedure "suffice" for a federal complaint. "Few

issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts." *Phillips v. County of Allegheny*, 515 F.2d 224, 230 (2d Cir. 2008).

For the reasons stated herein, Petitioners request this Court to grant this Writ.

Respectfully submitted,

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743 F.3d 59

United States Court of Appeals,
Fifth Circuit.

Tracey L. **JOHNSON**; David James, Jr.,
Plaintiffs-Appellants

v.

CITY OF SHELBY, MISSISSIPPI;
Harold Billings, Defendants-Appellees.

No. 12-60735.
Nov. 19, 2013.

Jim D. Waide, III, Esq., Waide & Associates, P.A., Tupelo, MS, for Plaintiff-Appellant.

Gary Erwin Friedman, Esq., William Brett Harvey, LaToya Cheree Merritt, Phelps Dunbar, L.L.P., Jackson, MS, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi, USDC No. 2:10-cv-00036.

Before HIGGINBOTHAM, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:*

The district court granted the defendants' motion for summary judgment and denied the plaintiffs'

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

subsequent motion to alter or amend the judgment. We AFFIRM.

FACTS AND PROCEEDINGS

Tracey L. Johnson and David James, Jr. were police officers for the City of Shelby County, Mississippi (the "City") in 2009. In September of that year, the City's board of aldermen, which has sole authority over the City's employment decisions, terminated Johnson and James, allegedly for violation of City residents' rights and police procedure. James requested and obtained a grievance hearing from the City, after which the board upheld their terminations.[1]

Johnson and James filed suit in district court, claiming that they were fired, not because of their alleged misconduct, but because they refused to turn a blind eye to the criminal activities of one of the aldermen, Harold Billings. They alleged that the City's conduct violated their Fourteenth Amendment due process rights and that Billings maliciously interfered with their employment in violation of state law.

Following discovery, the City and Billings filed a motion for summary judgment. In it, the City argued that it was entitled to judgment in its favor because

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[1] It is unclear from the record whether Johnson's termination was at issue in the hearing James requested.

Johnson and James did not invoke 42 U.S.C. § 1983 in their complaint, but instead sought to maintain their action against the City directly under the Fourteenth Amendment. Billings contended that the malicious interference claim was barred by Johnson's and Jones's [sic] failure to comply with the notice provision of the Mississippi Tort Claims Act ("MTCA"). The district court granted the motion and entered final judgment on all claims. Johnson and James moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), requesting leave to amend their complaint to invoke § 1983. The district court denied their motion, and they appeal this denial and the underlying grant of summary judgment for the City and Billings.

STANDARD OF REVIEW

We "review a district court's grant of summary judgment de novo, applying the same standard as did the district court." *Stults v. Conoco, Inc.*, 76 F.3d 651, 654 (5th Cir.1996). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kinney v. Weaver*, 367 F.3d 337, 348 (5th Cir.2004). "We view facts in the light most favorable to the non-movant and draw all reasonable inferences in its favor." *Jackson v. Widnall*, 99 F.3d 710, 713 (5th Cir.1996). But we "may affirm summary judgment on any legal ground raised below, even if it was not the basis for the district court's decision." *Performance*

Autoplex II Ltd. v. Mid-Continent Cas. Co., 322 F.3d 847, 853 (5th Cir.2003).

"Appellate review of the decision to grant or deny leave is generally described as limited to determining whether the trial court abused its discretion." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir.1981) (quotation marks and citation omitted).[2]

"We review de novo the district court's determination of state law." *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc.*, 612 F.3d 800, 804 (5th Cir.2010).

DISCUSSION

1. Fourteenth Amendment due process claim

Johnson and James contend that the district court erred when it determined that the City was entitled to summary judgment on their due process claims because they failed to invoke § 1983 in their complaint. We disagree.

We have consistently upheld such dismissals, explaining that "the proper vehicle for these allegations

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[2] Although we have "held that the Rule 15 standards apply when a party seeks to amend a judgment that has been entered based on the pleadings" we have expressed doubt as to "whether these liberal standards would apply to amendment of a judgment." *S. Constructors Grp., Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir.1993). We need not resolve this issue, here, however, as even reviewing the district court's decision for abuse of discretion, we conclude that the district court did not err.

is § 1983." *Burns-Toole v. Byrne,* 11 F.3d 1270, 1273 n. 3 (5th Cir.1994). A "complaint is fatally defective in that it fails to state a claim upon which relief may be granted" when it does not invoke § 1983 for claims of constitutional violations under color of state law. *Hearth, Inc. v. Dep't of Pub. Welfare,* 617 F.2d 381, 382-83 (5th Cir.1980) (dismissing such a complaint and further noting that "[i]t adds nothing to appellant's case to assume that a suit under § 1983 would be subject to defenses unique to the agency and its officials, for such defenses would also be available in the hypothetical implied Fourteenth Amendment cause of action").

We have explained that this requirement that "claims against state actors to be pursued through § 1983 is not a mere pleading formality." *Felton v. Polles,* 315 F.3d 470, 482 (5th Cir.2002), *abrogated in part on other grounds by Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). Certain consequences flow from claims under § 1983, such as the unavailability of *respondeat superior* liability, which bears on the qualified immunity analysis. *See id.*

In granting the City's motion for summary judgment on Johnson's and James's due process claim for failing to invoke § 1983, the district court followed this precedent. It did not err.

Johnson and James next contend that, even if they were required to invoke § 1983, the district court should have granted their Rule 59(e) motion seeking

leave to amend their complaint pursuant to Federal Rule of Civil Procedure 15 to allow them the opportunity to do so.

In *Freeman v. Cont'l Gin Co.*, this court held that there was no abuse of discretion in refusing to allow an amendment to the pleadings after summary judgment was granted. 381 F.2d 459, 470 (5th Cir.1967). It reasoned that:

> A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim. Liberality in amendment is important to assure a party a fair opportunity to present his claims and defenses, but equal attention should be given to the proposition that there must be an end finally to a particular litigation.

Id. at 469 (quotation marks and citation omitted); *see also Union Planters Nat'l Leasing, Inc. v. Woods,* 687 F.2d 117, 121 (5th Cir.1982) (holding that the district court did not abuse its discretion in denying a defendant's leave to amend his answer after summary judgment was entered). The *Freeman* court also noted that the plaintiff in that case did not seek an amendment prior to the district court's grant of summary judgment, but waited until its claim was rejected by the trial court. *See* 381 F.2d at 469; *see also Ford Motor Credit Co. v. Bright,* 34 F.3d 322, 324-25 (5th Cir.1994) ("Bright failed to plead a defense pursuant to § 9.504(c) in his answer to Ford Credit's complaint. He also failed to seek leave to amend his answer to include the defense before the district court entered

summary judgment against him.... In this case, we find that the district court did not abuse its discretion in denying Bright's Rule 59(e) motion."); *cf. Tex. Indigenous Council v. Simpkins,* No. 12-50244, 544 Fed.Appx. 418, 421-22, 2013 WL 5924497, at *3 (5th Cir. May 21, 2013) (per curiam) (unpublished) (holding that the district court should have allowed plaintiff to amend the complaint to invoke § 1983 when plaintiff sought leave after the amendment deadline but before summary judgment was entered).

The court's rationale in *Freeman* applies here. The district court – as well as the City – need not be subjected to successive theories of the plaintiffs' case. Johnson and James did not seek to amend their complaint even after the City filed its summary judgment motion. They waited until they lost on one theory and then sought to upset the finality of the district court's judgment by introducing a new theory. The district court did not abuse its discretion by rebuffing this attempt.

2. Malicious interference with contract claim

Finally, Johnson and James appeal the district court's grant of summary judgment for the City and Billings on their malicious interference with contract claim. They argue that the district court's conclusion that this claim was barred because they did not comply with the MTCA's notice provisions was error.

The MTCA waives the sovereign immunity "of the state and its political subdivisions from claims for

money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment," Miss.Code Ann. § 11-46-5(1), subject to the plaintiff "fil[ing] a notice of claim with the chief executive officer of the governmental entity" at least *ninety* days before instituting the suit, § 11-46-11(1). This "notice requirement applies to suit brought against an employee, acting in his official capacity." *McGehee v. DePoyster,* 708 So.2d 77, 79 (Miss.1998). Moreover, "an action against a government employee in his individual capacity may be subject to notice of claim requirements if the act complained of occurred within the scope and course of his employment." *Id.* at 80. The MTCA, however, does not "requir[e] notice to . . . government authorities of suit brought against [them] individually for acts outside of the scope of [their] employment." *Id.* at 81.

Johnson and James argue in their opening brief that the MTCA – and its notice requirement – does not apply to a suit against a government official for malicious interference because an official who acts maliciously does not act within the scope of his employment. They rely on *Zumwalt v. Jones County Board of Supervisors,* which held the MTCA inapplicable to such claims: "Tortious interference with business relations and contracts requires proof of malice as an essential element. Therefore, the MTCA does not apply to these torts. . . ." 19 So.3d 672, 688 (Miss.2009) (internal citation omitted). In response, the City and Billings point to a more recent precedent

from the Supreme Court of Mississippi holding that "the MTCA covers . . . tortious breaches of contract."[3] *Whiting v. Univ. of S. Miss.*, 62 So.3d 907, 916 (Miss.2011). As appellees concede, these cases "clearly contradict one another on the question of whether a plaintiff alleging malicious interference by a public employee must satisfy the notice requirements of § 11-46-11 of the MTCA." Because we apply "the latest and most authoritative expression of state law applicable to the facts of a case," *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 239 (5th Cir.1997), we follow *Whiting* here.[4]

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[3] In Mississippi, tortious interference with contract and malicious interference with contract are the same cause of action. *See Cenac v. Murry*, 609 So.2d 1257, 1268-69 (Miss.1992).

[4] Although this is the first time this court has remarked on the conflict between these cases, we note that federal courts have not consistently relied on *Whiting*. At least four district courts in the circuit have relied on *Zumwalt* for the position that the MTCA does not apply to tortious interference claims. *See Bonney v. Leflore Cnty.*, 4:11-CV107-SA-JMV, 2013 WL 1293812, at *6 (N.D.Miss. Mar. 26, 2013); *Bolton v. Forrest Cnty.*, 2:11-CV-220-KS-MTP, 2012 WL 6600147, at *12 (S.D.Miss. Dec. 18, 2012); *Pike Cnty. ex rel. Bd. of Supervisors v. Indeck Magnolia, LLC*, 3:11-CV-57-TSL-MTP, 2011 WL 3439935, at *3-4 (S.D.Miss. Aug. 5, 2011); *Kermode v. Univ. of Miss. Med. Ctr.*, 3:09-CV-584-DPJ-FKB, 2011 WL 4351340, at *9 n. 76 (S.D.Miss. Sept. 15, 2011), *aff'd on other grounds*, 496 Fed.Appx. 483 (5th Cir.2012). But two other Mississippi district courts have come to the opposite conclusion, relying on *Whiting*. *See Salcido v. Univ. of S. Miss.*, 2:11-CV173KS-MTP, 2012 WL 663016, at *9 (S.D.Miss. Feb. 28, 2012) ("Salcido's alleged contract claims are in reality for tortious breach of contract and tortious interference with contract which are governed by the Miss. Torts Claim Act.");

(Continued on following page)

Johnson and James attempt to avoid *Whiting*'s holding by distinguishing the case on the ground that it involved claims against a state university, while they are suing Billings individually. But their entire argument turns on their contention that malicious interference claims cannot be brought against a state or its subdivisions for the acts of their employees, because the employee will never be acting within the scope of his employment if he acts with malice. *Whiting,* however, allowed a claim for malicious interference to be brought against state entities, which required the state supreme court to conclude that the employees in that case *did* act within the scope of their employment. Thus, Johnson's and James's contention that if Billings maliciously interfered with their employment, he acted outside the scope of his employment is incorrect under Mississippi precedent. They provided the district court no other reason why Billings's actions were outside the scope of his employment. The district court, therefore, properly determined that the MTCA applied and that Johnson's and James's claims were barred because they did not comply with its notice requirements.

Gray v. City of Gautier, 1:10-CV-00506-HSO, 2012 WL 3913053, at *8 (S.D.Miss. Sept. 7, 2012).

CONCLUSION

We AFFIRM the district court's grant of summary judgment for the defendants and denial of plaintiffs' motion to alter or amend the judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF MISSISSIPPI
DELTA DIVISION

TRACEY L. JOHNSON
and DAVID JAMES, JR. **PLAINTIFFS**

V. **NO. 2:10CV36-M-A**

CITY OF SHELBY,
MISSISSIPPI and
HAROLD BILLINGS **DEFENDANTS**

ORDER

This cause is before the Court on the defendants' Motion for Summary Judgment [53]. The Court, having reviewed the motion, the response, the briefs of the parties, the authorities cited and being otherwise fully advised in the premises, finds as follows, to-wit:

The City of Shelby seeks dismissal of plaintiffs' constitutional claims for deprivation of property without due process of law based on the premise that a claimant may not recover from state and local officials for a constitutional violation through means of an action directly under the Fourteenth Amendment. Instead, where there is an applicable statutory mechanism, such as 42 U.S.C. § 1983, plaintiffs must seek redress by that means. *Berger v. City of New Orleans,* 273 F.3d 1095 (5th Cir. 2001). *See also Flemons v. City of Oxford,* Civil Action No. 3:04CV135-P-A (N. D. Miss. March 6, 2006) (granting summary

judgment on identical grounds). In this case, plaintiffs' Complaint simply avers that plaintiffs are pleading causes of action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the Fourteenth Amendment.[1] Because this case is indistinguishable from those cited herein, the City of Shelby is entitled to judgment as a matter of law on the plaintiffs' constitutional claims.

Defendant Harold Billings also seeks dismissal of plaintiff's state law claim for malicious interference with employment based on their failure to comply with the notice provisions of the Mississippi Tort Claims Act. Plaintiffs do not dispute their failure to comply with the notice provisions of the Act; instead, they contend that the MTCA does not govern their claim against Billings. They urge the Court to find that Billings was acting outside the course and scope of his employment when he voted, in his capacity as an Alderman for the City of Shelby, to terminate plaintiffs' employment. The Court has considered the arguments raised by the plaintiffs and finds them to be without merit. Accordingly, the plaintiffs' state law claim against Billings is governed by the MTCA; their claim against him is barred for failure to comply with Miss. Code Annotated § 11-46-11.

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[1] Despite the averments of plaintiffs' Complaint, neither Ms. Johnson nor Mr. James assert a race discrimination claim; more important, neither Title VII nor § 1981 provide a procedural mechanism for seeking redress of a constitutional violation by a municipality.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendants' Motion for Summary Judgment [53] is well-taken and should be, and hereby is, GRANTED. IT IS FURTHER ORDERED that this cause should be, and hereby is, DISMISSED WITH PREJUDICE, each party to bear its own costs.

SO ORDERED, this the 28th day of March, 2012.

/s/ MICHAEL P. MILLS
CHIEF JUDGE
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF MISSISSIPPI
DELTA DIVISION

TRACEY L. JOHNSON
and DAVID JAMES, JR. **PLAINTIFFS**

V. **NO. 2:10CV36-M-A**

CITY OF SHELBY,
MISSISSIPPI and
HAROLD BILLINGS **DEFENDANTS**

FINAL JUDGMENT

This cause came on for hearing on defendants' Motion for Summary Judgment [53]. The Court, having considered the motions and being otherwise fully advised in the premises, finds as follows, to-wit:

In accordance with the Order entered contemporaneously herewith, the Court finds that the defendants' motion is well-taken and should be sustained.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendants' Motion for Summary Judgment [53] is well-taken and should be, and hereby is, GRANTED. This cause is hereby DISMISSED WITH PREJUDICE, each party to bears its own costs.

This, the 28th day of March, 2012.

/s/ MICHAEL P. MILLS
CHIEF JUDGE
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF MISSISSIPPI
DELTA DIVISION

TRACEY L. JOHNSON
and DAVID JAMES, JR. **PLAINTIFFS**

V. **CASE NO. 2:10CV036-M-A**

CITY OF SHELBY,
MISSISSIPPI and
HAROLD BILLINGS **DEFENDANTS**

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

This cause is before the court on plaintiff's motion [77] to alter or amend judgment of this court's final order granting defendant's motion for summary judgment. For the reasons set forth in the court's original opinion, this motion is DENIED.

SO ORDERED this the 22nd day of August, 2012.

/s/ MICHAEL P. MILLS
CHIEF JUDGE
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF MISSISSIPPI

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-60735

TRACEY L. JOHNSON; DAVID JAMES, JR.,

Plaintiffs-Appellants

v.

CITY OF SHELBY, MISSISSIPPI;
HAROLD BILLINGS,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Mississippi, Delta Division

---

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion ___, 5 Cir., ___, ___, F.3d ___

Before HIGGINBOTHAM, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R.

APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/Edith Brown Clement
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF MISSISSIPPI
DELTA DIVISION

TRACEY L. JOHNSON
and DAVID JAMES, JR. **PLAINTIFFS**

VS **CAUSE NO.: _____**

CITY OF SHELBY,
MISSISSIPPI and
and HAROLD BILLINGS **DEFENDANTS**

JURY TRIAL DEMANDED

COMPLAINT

This is an action to recover actual damages against the Town of Shelby, Mississippi, for denial of property without due process of law. A supplemental claim is also made against the individual defendant, Harold Billings, for malicious interference with employment under state law. The following facts support this action:

1.

Plaintiff, TRACEY L. JOHNSON, is an adult resident citizen of Mississippi, who resides at 901 Front Street, Rosedale, Mississippi 38769.

Plaintiff, DAVID JAMES, JR., is an adult resident citizen of Mississippi, who resides at 354 McKay Road, Rosedale, Mississippi 38769.

2.

Defendant, CITY OF SHELBY, MISSISSIPPI, is a political subdivision of the State of Mississippi, which at all relevant times acted under color of state law. It may be served with process upon its Mayor Kermit E. Stanton at Shelby City Hall, 305 Third Street, Shelby, Mississippi 38774.

Individual Defendant, HAROLD BILLINGS, is an adult resident citizen of Mississippi, who at all relevant times was an alderman of the City of Shelby, Mississippi. He may be served with process at his place of employment at 305 Third Street, Shelby, Mississippi 38774.

3.

This Court has federal question jurisdiction under 28 U.S.C. § 1331, civil rights jurisdiction under 28 U.S.C. § 1343, for a cause of action arising under Title VII of the Civil Rights Act of 1964, under 42 U.S.C. § 1981 and under the Fourteenth Amendment of the United States Constitution.

4.

Plaintiff Tracey Johnson was employed as a police officer for the City of Shelby from approximately

August 2007 until her unlawful termination on or about September 1, 2009. Plaintiff David James, Jr., was employed as a police officer for the City of Shelby from approximately September 2007 until his unlawful termination on or about September 1, 2009.

5.

During the time of Plaintiffs' employment, the Defendant had in effect personnel policies which required "cause" for termination. These personnel policies gave Plaintiffs a "property" interest during their employment.

6.

During the time of Plaintiffs' employment, Plaintiffs had a reputation for rigorously enforcing the law. Plaintiff James, in particular, had a reputation for vigorous enforcement of the law because of his background as a district attorney's investigator, his thorough knowledge of police procedures, and his diligence in enforcing the law.

Tracey Johnson, while having less experience, followed James' lead, and was supportive of him in vigorous enforcement of the law. The Plaintiffs worked a night shift, whereby they made numerous arrests for widespread criminal activity, including activity related to drugs, and including both serious offenses and misdemeanor offenses.

7.

During the time Plaintiffs were employed, the individual Defendant, Harold Billings, served as a City Alderman. However, Billings' primary occupation was that of operating a nightclub, where much criminal activity occurred. Plaintiffs made a substantial number of arrests for illegal activity by patrons of Billings' nightclub. Billings entertained enormous malice, ill-will and hostility toward Plaintiffs, particularly against Plaintiff James, because of their role in frustrating the criminal activity occurring at his nightclub.

8.

Accordingly, Billings used his influence on other aldermen, and upon the mayor, to cause Plaintiffs' discharge. The mayor was easily susceptible to influence, because of his reputation as a known alcoholic, who feared vigorous enforcement of the law.

9.

For some time, the mayor had been led by Billings to fire Plaintiff James, because the City did not wish the law to be vigorously or substantially enforced. During the process of attempting to get James fired, Billings approached Johnson, and explained to her that if she would "get something on" James, in order to justify firing him, she would not be fired. Defendant Johnson refused to carry out this malicious request.

10.

Accordingly, at directions of an agent of the City, believed to be either the mayor or Billings, the court clerk searched for ways to find some basis upon which to fire Plaintiffs. Finally, an incident report was made that Plaintiffs had been guilty of some wrongdoing, with respect to an attempted arrest of a Mr. Tanner. Additionally, reports were made of some wrongdoing with respect to embezzlement charges that Plaintiffs had made on or about August 28, 2009.

11.

Two incident reports were the subject of a discharge letter to David James attached hereto, dated September 3, 2009. The reasons assigned in the letter are totally pretextual, and were simply the result of a clerk being directed to find something upon which to fire Plaintiff James. The letter came from an agent of the City of Shelby.

12.

Consistent with City procedures, Plaintiffs requested a due process hearing. Plaintiffs were allowed to appear at the hearing, but were promptly advised that no evidence would be received. In no event could Plaintiffs obtain a fair due process hearing, because a determination had already been made that Plaintiffs were going to be fired, because they carried out the law in a vigorous fashion.

13.

At the hearing, no substantial evidence was introduced of any wrongdoing. In fact, no evidence at all was introduced, since the Board of Aldermen announced it would not receive any evidence.

14.

Although Plaintiffs had a "property" right of employment, they were discharged arbitrarily and capriciously, in violation of substantive due process.

15.

Even though Plaintiffs had a "property" interest in employment, they were denied meaningful procedural due process, since they were not allowed to present evidence or witnesses, such evidence and witnesses being immaterial to the town, since it was determined to fire Plaintiffs regardless of the evidence.

16.

The individual Defendant, Billings, caused the Mayor and a majority of the Board to discharge Plaintiffs. This represented the tort of malicious interference with employment.

17.

The Defendant City is liable to Plaintiffs for deprivation of property without due process.

18.

The Defendant Billings is liable to Plaintiffs for malicious interference with employment.

19.

Plaintiffs have suffered mental anxiety and stress, and lost income as a result of their illegal discharge.

REQUEST FOR RELIEF

Plaintiffs request actual damages against the City of Shelby, Mississippi, actual and punitive damages against the individual Defendant, Harold Billings, reinstatement and reasonable attorneys' fees.

Respectfully submitted,

WAIDE & ASSOCIATES, P.A.

BY: _____

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RECORD AND BRIEFS

No. 13-1318

JUL - 2 2014

In The

Supreme Court of the United States

TRACEY L. JOHNSON AND DAVID JAMES, JR.,

Petitioners,

vs.

CITY OF SHELBY, MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff who pleads a claim directly under the Fourteenth Amendment is entitled to have it construed as a claim for damages brought pursuant to 42 U.S.C. § 1983, despite failing to invoke that statute in his complaint.

PARTIES TO THE PROCEEDING

Petitioners are Tracey L. Johnson and David James, Jr. Respondent is the City of Shelby, Mississippi.

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INTRODUCTION

This is not, as the Petitioners contend, a case about a technical failure to cite a relevant statute. Rather, it is a case about two different sources of law – the Fourteenth Amendment and 42 U.S.C. § 1983 – that give rise to two different types of claims. Claims for injunctive or declaratory relief from an unconstitutional action may be brought directly under the Fourteenth Amendment. By contrast, claims for money damages stemming from Fourteenth Amendment due process violations must be brought via the statutory vehicle of 42 U.S.C. § 1983.

Petitioners chose to plead their claim directly under the Fourteenth Amendment. App. 21. They alleged they were terminated without due process. App. 24-25. Among their multiple claims and requested remedies was a request for injunctive relief in the form of "reinstatement." App. 26. Thus, Petitioners arguably satisfied Rule 8(a)(2) of the Federal Rules of Civil Procedure to the extent they sought injunctive relief directly under the Fourteenth Amendment.

Petitioners did not, however, invoke § 1983 or plead any facts showing that any due process violation had caused them monetary damages. App. 20-27. Thus, to the extent they sought money damages for a due process violation, Petitioners did not give "fair notice of what the [. . .] claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), *quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957). Later, in their summary

judgment briefs, Petitioners conceded they really were seeking money damages available under § 1983, after all. The district court dismissed that claim, as it had never been raised in the complaint. App. 12-13.

Petitioners' argument rests on the assumption that these two types of claims are interchangeable, such that – whenever a party alleges a Fourteenth Amendment due process violation – opposing parties and courts must presume he means to bring a claim for money damages and read into the complaint a claim under 42 U.S.C. § 1983 if one is not pled. Below, the Fifth Circuit rightly rejected this notion that invoking § 1983 is a "mere pleading formality." App. 12, *citing Felton v. Polles*, 315 F.3d 470, 482 (5th Cir. 2002).

Pleading § 1983 informs public entities – and more importantly, individual public officials – that money damages are being sought from them, rather than just injunctive relief. This notice is critical, as money damage awards against individual officials can be financially devastating, and may spur them to seek their own counsel or to defend the case more aggressively than if only an injunction were at stake. Likewise, pleading § 1983 notifies the parties that fundamentally different standards of liability apply – specifically, that *respondeat superior* liability is not available and that individual defendants may invoke qualified immunity. Pleading directly under the Fourteenth Amendment, as the Petitioners did here, provides notice of none of these things.

There is no split among the circuits on this question, nor is there any other compelling reason to grant a writ of certiorari. Ultimately, this is a fact-bound, highly idiosyncratic case about an experienced civil rights lawyer who pled a claim directly under the Fourteenth Amendment when he meant to plead a claim for money damages under 42 U.S.C. § 1983. The plaintiff is the master of his complaint, so neither courts nor defendants should be obliged to guess as to what the plaintiff's lawyer subjectively intended. The Fifth Circuit applied this straightforward rule correctly, and thus the writ should be denied.

STATEMENT OF THE CASE

A. Factual Background

Although it is largely immaterial to the question presented in the petition, it is worth noting briefly that the Petitioners' account of the reasons for their termination is disputed by the Respondent.

Petitioners Tracey Johnson and David James, as police officers for the City of Shelby, Mississippi, made a practice of ignoring police procedure and the civil rights of residents. Shortly after James was hired, the City began receiving complaints that he was "profiling," targeting, and harassing residents for no reason. In April 2009, Petitioners were dispatched in response to a distress call at an apartment complex in Shelby. The City received complaints that the Petitioners were harassing residents who were not

the subject of the call. Residents of the apartment complex ultimately filed a petition alleging they had been "harassed and violated" by the Petitioners.

In May 2009, the City received a letter complaining that Officer James had entered the local housing authority and accused an employee, Mary Young, of "housing drug dealers" without any evidence. It appears this visit was an attempt to retaliate against Young, who days earlier had met with police officials to complain about James's harassing behavior.

To make a long story suitably brief, the City's Board of Aldermen considered a motion to terminate the Petitioners in July 2009, but it failed on a 2-2 vote. Shortly after the vote, the vehicles of the two aldermen who voted to terminate were burned. Two former City of Shelby police officers were arrested and charged with the crime. Then, in August 2009, the Petitioners were suspended after trying to have the victim of an auto theft lure the alleged thief back into the city limits to be arrested.

In September 2009, the Board again considered a motion to terminate the Petitioners' employment. This time, the motion carried by a vote of 3-2. On September 3rd, the city attorney advised the Petitioners of their termination. Officer James indicated he would appeal the decision. In October 2009, a grievance hearing was held and the Board upheld his termination.

B. Procedural History

The procedural history provided by Petitioners is largely accurate. Some important details are omitted or misstated, however.

First, this was not a case in which a plaintiff omitted a necessary pleading then promptly sought to amend his complaint and add it. Instead, Petitioners' first and only request to amend their complaint to incorporate 42 U.S.C. § 1983 came via a motion for post-judgment relief under Rule 59(e) of the Federal Rules of Civil Procedure nearly thirty days after summary judgment was entered. As the Fifth Circuit noted, Petitioners "waited until they lost on one theory and then sought to upset the finality of the district court's judgment by introducing a new theory." App. 7. The Fifth Circuit held it was not an abuse of discretion to deny this belated request. *Id.*

Second, Petitioners assert that the district court "granted summary judgment on the sole ground that Petitioners had failed to cite in their complaint the statute (42 U.S.C. § 1983), which authorizes the cause of action." Pet. 5, *citing* App. 12-13. That is not what the district court held. Petitioners steadfastly refuse to accept that there is such a thing as a claim brought directly under the Fourteenth Amendment, but the district court did not adopt that fiction. Instead, the Court held that "a claimant may not recover from state and local officials for a constitutional violation through means of an action directly under the Fourteenth Amendment." App. 12.

In short, the district court correctly construed Petitioners' complaint as raising a direct action under the Fourteenth Amendment. After all, Petitioners' complaint did request injunctive relief in the form of "reinstatement" and did not allege facts showing monetary injury. App. 24-26. However, Petitioners conceded in their summary judgment brief that they actually were seeking money damages under § 1983, not the declaratory or injunctive relief available directly under the Fourteenth Amendment. The district court rightly dismissed that claim, as it was not pled in the complaint.

As discussed below, pleading under 42 U.S.C. § 1983 provides notice that a claimant seeks to recover money damages from a government defendant – or, as here, an individual public official. Because no such notice was provided in the complaint, the district court followed Fifth Circuit precedent and dismissed the Fourteenth Amendment claim.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit Correctly Held That Courts And Opposing Parties Are Not Required To Infer A § 1983 Claim For Damages When A Plaintiff Elects To Sue Directly Under The Fourteenth Amendment.

Petitioners' arguments all hang on the assumption that a complaint alleging a violation of the Due

Process Clause of the Fourteenth Amendment must necessarily also be a claim for money damages under 42 U.S.C. § 1983. That simply is wrong.

Claims for injunctive or declaratory relief from an unconstitutional action or law may be brought directly under the Fourteenth Amendment. This Court has recognized the availability of such claims, noting that the Fourteenth Amendment "is undoubtedly self-executing without any ancillary legislation." *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *see also Ex parte Young*, 209 U.S. 123 (1908) (approving issuance of injunctive relief claimed directly under Fourteenth Amendment). Further, in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), this Court repeatedly observed that § 1983 provides the exclusive remedy where a claim is for "damages," thus implicitly recognizing what it previously held: that non-monetary relief is available directly under the Fourteenth Amendment.

As one district court put it, the enactment of § 1983 "did not strip citizens of standing to bring direct challenges under the Fourteenth Amendment." *Davis v. Commonwealth Election Comm.*, 2014 WL 2111065 at *7 (D. N. Mar. I. 2014). Other courts have reached the same conclusion. *See, e.g., Robinson v. Kansas,* 295 F.3d 1183, 1191 (10th Cir. 2002) (party "may seek prospective injunctive relief against state officials" directly under Fourteenth Amendment); *Rubenstein v. Benedictine Hosp.*, 790 F. Supp. 396, 407 (N.D.N.Y. 1992) (plaintiffs adequately pled due

process claim for "declaratory and injunctive relief directly under the Fourteenth Amendment").

Rather than serve as the "implementing legislation" for the Due Process Clause of the Fourteenth Amendment, 42 U.S.C. § 1983 creates a separate cause of action for damages, which are not available via a direct constitutional claim. *See, e.g., Jett*, 491 U.S. at 704-05, 714; *see also Magana v. Com. of the Northern Mariana Islands,* 107 F.3d 1436 (9th Cir. 1997) ("action for money damages" may not be brought directly under Fourteenth Amendment).

Because the claim and the stakes are fundamentally different, this Court has recognized that the standards for liability under § 1983 are likewise different. For instance, there is no *respondeat superior* liability under § 1983. *See, e.g., Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 122-23 (1992). Municipal liability attaches only where "a deliberate choice to follow a course of action is made from among various alternatives by [the relevant] officials." *Connick v. Thompson*, 131 S.Ct. 1350, 1360 (2011), *quoting Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986). Likewise, this Court has recognized that individual public officials' fear of monetary liability under § 1983 justifies a grant of qualified immunity:

> Under § 1983 [. . .] a plaintiff may seek money damages from government officials who have violated her constitutional or statutory rights. But to ensure that fear of liability will not "unduly inhibit officials in the discharge of their duties," *Anderson v.*

> *Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the officials may claim qualified immunity; so long as they have not violated a "clearly established" right, they are shielded from personal liability, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Camreta v. Greene, 131 S.Ct. 2020, 2030-31 (2011). Where a plaintiff seeks only injunctive relief, no such immunity is available. *See, e.g., Rogers v. Miller*, 57 F.3d 986, 989 n. 4 (11th Cir. 1995) ("The qualified immunity defense has no application to [. . .] attempts to gain injunctive relief.").

Lower courts have had no trouble recognizing this basic distinction or its implications. In *Farmer v. Ramsay*, for example, the district court held that claims for damages brought directly under the Fourteenth Amendment were properly dismissed, but that "claim[s] for injunctive relief involve[ ] a different analysis" and "are permissible directly under the 14th Amendment." 41 F. Supp. 2d 587, 591 (D. Md. 1999).

Once the distinction between § 1983 damages claims and direct claims under the Fourteenth Amendment is clarified, the Petitioners' argument is reduced to an assertion that courts and opposing parties should be required to assume that a plaintiff asserting a Fourteenth Amendment violation necessarily means to assert a claim for damages under § 1983. The Fifth Circuit rejected this implicit burden-shifting argument long ago: where a party "does not rely on any statute or common law doctrine which

might authorize [. . .] a suit in the federal courts, we must assume that [the party] wishes us to hold that the Fourteenth Amendment alone provides a basis for relief in this case." *Hearth, Inc. v. Department of Public Welfare*, 617 F.2d 381, 382 (5th Cir. 1980). This reasonable approach assigns to plaintiffs the light burden of notifying defendant municipalities and public officials if they intend to seek money damages for an alleged constitutional violation, rather than just injunctive relief.

Petitioners point to this Court's admonitions against "heightened pleading standards," but no such standards are at issue here. *See* Pet. 7, *citing Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). This is not a case in which the lower court demanded some formal recitation beyond what Rule 8 requires. Nor is it a case about the quantum of factual allegations necessary to avoid dismissal. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Twombly*, 550 U.S. 544. As noted above, it is a case in which two different claims were available, with the invocation of the Fourteenth Amendment alone providing notice of one, and the invocation of the Fourteenth Amendment and 42 U.S.C. § 1983 in tandem providing notice of another. Petitioners simply did not meet their burden under Rule 8(a)(2) of alleging a claim for damages against the municipal and individual defendants.

Petitioners also point to dicta from this Court's opinion in *Gomez v. Toledo*, 446 U.S. 635 (1980). However, *Gomez* addressed only the narrow question

whether a § 1983 plaintiff was required to plead bad faith on the part of the government official, or alternatively, whether good faith was properly raised as part of an affirmative defense of qualified immunity. *See id.* at 635-36. The Court found the latter and reversed. *See id.* at 638-42. The petitioner invoked § 1983 in his complaint and demanded backpay, so – unlike this case – there was clear and explicit notice of the nature of claim against the official. *See id.* at 636-37. In short, *Gomez* is wholly inapposite here.

Finally, Petitioners note that, in this particular case, counsel for the Respondent correctly anticipated that – despite the failure to plead § 1983 – Petitioners' attorney might have subjectively intended to seek money damages. *See* Pet. 10. Consequently, in an abundance of caution, Respondents pled an affirmative defense under that statute. *See id.* However, this point only illustrates just how fact-bound and idiosyncratic the dispute here is.

Petitioners' counsel is among the most experienced plaintiff attorneys in Mississippi. Respondent's counsel has litigated many dozens of municipal civil rights cases against him. As a result, Respondent's counsel has learned to anticipate the intentions of Petitioners' counsel, even where the complaint fails to make them clear. In particular, Respondent's counsel knew that Petitioners' counsel recently had another direct Fourteenth Amendment claim dismissed because of failure to plead § 1983, and had other complaints dismissed for the same reason before. *See Lofton v. City of West Point, Miss.*, 2012 WL 1135862

at *10 (N.D. Miss. 2012). In short, Respondent's counsel was aware Petitioners' counsel might later try to convert his direct Fourteenth Amendment action into a § 1983 damages claim, as he attempted to do in other cases. Thus, Respondent's counsel raised a defense to § 1983 in case the district court erred and permitted such a reversal in course.

In other words, one specific attorney was able to read the tea leaves and anticipate an attempt to raise an unpled claim due to years of experience litigating against another specific attorney. Other counsel should not have to read the tea leaves. Rule 8 requires only that they read the complaint. Here, the complaint contained a direct action under the Fourteenth Amendment, including a request for injunctive relief in the form of "reinstatement." App. 20-26.

The district court and the Fifth Circuit correctly applied a straightforward rule. That rule assigns plaintiffs the light burden of notifying public entities and officials – normally by invoking 42 U.S.C. § 1983 – if they intend to seek damages rather than the injunctive relief available directly under the Constitution. This is consistent with this Court's mandate that pleadings provide "fair notice of what the [. . .] claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. Petitioners have failed to provide any compelling justification for review here, so the writ should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

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TRACEY L. JOHNSON and DAVID JAMES, JR.,

Petitioners,

versus

CITY OF SHELBY, MISSISSIPPI,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITIONERS' REPLY MEMORANDUM

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REPLY ARGUMENT

The gist of Respondent's position is that a complaint seeking damages for violation of constitutional rights under color of state law must contain a specific citation to 42 U.S.C. § 1983. Respondent argues, however, that a suit seeking injunctive relief for violation of constitutional rights may be brought "directly under the Fourteenth Amendment" without citing 42 U.S.C. § 1983. Respondent's Brief in Opposition to Petition for Certiorari, p. 7. Because Petitioners' complaint failed to cite 42 U.S.C. § 1983 and seeks damages, Respondent argues the lower courts correctly dismissed it.

Respondent's reading of 42 U.S.C. § 1983 conflicts with the statute's clear language. By its very terms, 42 U.S.C. § 1983 provides a cause of action for violation of any rights "secured by the Constitution" whether they be in the form of "an action at law" or in the form of a "suit in equity." 42 U.S.C. § 1983. In the face of such clear statutory language, any argument attempting to distinguish between an "action at law" and a "suit in equity" as determinative of whether 42 U.S.C. § 1983 must be cited in a complaint is frivolous.

Respondent cites several cases, the genesis of which is *Ex parte Young*, 209 U.S. 123, 159-60 (1908), in support of its argument that one may sue in equity directly under the Fourteenth Amendment, without relying upon 42 U.S.C. § 1983. This argument is nonsense. *Ex parte Young*, 209 U.S. at 159-60, holds only that " . . . a suit against individuals, for the purpose of preventing them, as officers of a state,

from enforcing an unconstitutional enactment, . . . is not a suit against the state within the meaning of [the Eleventh] Amendment." *Ex parte Young*, 209 U.S. at 154. *Ex parte Young*, and the multitude of cases cited in Respondent's brief applying the rule of *Ex parte Young*, hold only that when plaintiffs are, in reality, seeking monetary damages against the state, their claims are barred by the Eleventh Amendment. *See, e.g., Robinson v. Kansas*, 295 F.3d 1183, 1191 (10th Cir. 2002), cited in Respondent's Brief in Opposition to Petition for Certiorari, p. 7.

This case is not about Eleventh Amendment immunity, which is the subject of *Ex parte Young*. Instead, this case centers upon what must be pled in order to allege a violation of federal constitutional rights. Petitioners have never claimed that they may pursue any claims (whether for injunctive relief or damage relief) directly under the Fourteenth Amendment. Petitioners know all such claims must be pursued under 42 U.S.C. § 1983. They simply failed to cite 42 U.S.C. § 1983 in the complaint, and the Fifth Circuit Court of Appeals held that this omission is fatal to Petitioners obtaining any relief on the merits.[1]

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[1] Respondent claims that Petitioners waited until after the Fifth Circuit Court of Appeals had dismissed their complaint before moving to amend the complaint so as to cite 42 U.S.C. § 1983. Respondent's Brief in Opposition to Petition for Certiorari, p. 7. Actually, Respondent waited until after the deadline for amendments to expire before it filed its motion for summary judgment, in which it alleged, for the first time, that the complaint was deficient because 42 U.S.C. § 1983 – the authorizing statute

(Continued on following page)

Perhaps the Fifth Circuit believes such hyper-technicality is endorsed by this Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Those two (2) cases, however, hold only that allegations of a complaint must contain enough facts to show that a claim is "plausible." *See* Carly R. Wilson, *Complaints Must Plead Non-Conclusory Facts that Manifest Plausibility to Survive a Motion to Dismiss in All Civil Cases: Ashcroft v. Iqbal*, 48 Duq. L. Rev. 173 (2010).

In fact, to reverse this case is to honor *Iqbal* and *Twombly*. *Twombly* expressly noted that " . . . we do not apply any 'heightened' pleading standard,. . . ." 550 U.S. at 569, n. 14. *Iqbal* likewise stated that "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era,. . . ." 556 U.S. at 678.[2]

– was not cited in the complaint. The simple issue presented is whether a complaint alleging a violation of federal constitutional rights under color of state law is fatally defective when it does not cite 42 U.S.C. § 1983.

[2] To be sure, there is immense disagreement about the extent to which *Iqbal* and *Twombly* intended to modify federal pleading standards. Compare, for example, Adam N. Steinman, *The Pleading Problem*, 62 Stan. L. Rev. 1293 (2010) (arguing that *"The Supreme Court's recent decisions in* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal *have the potential to upend civil litigation as we know it"* with Daniel W. Robertson, *In Defense of Plausibility: Ashcroft v. Iqbal and What the Plausibility Standard Really Means*, 38 Pepp. L. Rev. 111, 153-54 (2010) (arguing that *Iqbal* did not misinterpret Rule 8).

CONCLUSION

This Court should grant the Writ and hold the lower federal courts have no authority to impose a pleading requirement for a complaint beyond those requirements contained in Fed. R. Civ. P. 8.

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